No. 48068-9-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

GARY BROWN, JR., Appellant.

Appeal from the Superior Court of Grays Harbor County
The Honorable David Edwards
No. 14-1-00390-3

BRIEF OF APPELLANT GARY BROWN, JR.

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8. Defense counsel's failure to requesting a limiting instruction regarding Mr. Snodgrass' statement being admitted only for impeachment purposes was error.
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II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

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III. STATEMENT OF THE CASE

On April 22, 2014, a fire erupted in a single wide trailer. (RP 19-20). J.J. Haskey and Sally Emery bad been living in the trailer. (RP 23). J.J. and Sally[1] were not at home when the fire started. (RP 141).

The trailer was on a 25 acre lot, along with two other dwellings. (RP 18). Clarence "Lucky" Russell lived and operated a gun shop ninety feet away. (RP 18, 24). Jose Orellana-Arita and Brandi Haley lived in the third dwelling. (RP 25). Jose and Brandi did not testify at trial.

[1] For clarity, counsel will refer to witnesses as they were commonly referred to at trial, which was generally by their first name. No disrespect is intended.

1. The Green Van

A green van was seen on the property before the trailer erupted in flames. (RP 20). The van belonged to Edna Ferry. (RP 21-22). At the time, Edna Ferry was dating Gary Brown (aka Gary Taylor). (RP 85).

When the fire started, Lucky Russell was at his property/gun shop, along with David Crosby and Dan Evans. (RP 22, 24). Lucky saw the green van by Jose and Brandi's. (RP 25). Dan Evans testified that he couldn't tell if the van stopped at JJ. and Sally's trailer because he couldn't see it once it went past the trailer. (RP 44). Lucky went into his shop. (RP 25). Then, he heard a loud boom and came out to investigate. (RP 27). That's when he saw the trailer was on fire. (RP 20). He testified that the explosion happened about thirty seconds after the van left. (RP 21). David Crosby testified that he heard the boom first, then saw the van leave, but he told the police that the van was there for five minutes, left, and five minutes later there was a boom. (RP 34-35). Dan Evans said the van was there for three to five minutes, then he heard an explosion a minute after the van left. (RP 43-44).

None of the witnesses saw anyone get out of the van or go into the trailer. (RP 24, 36). No one heard any glass breaking before the fire. (RP 36, 44).

David Crosby testified that a lot of cars come in and out of there

because of drug activity, so he doesn't really pay attention to cars that come on the property. (RP 33). He couldn't remember if any other cars had been there that day. (RP 35).

Danny Mohr, Jr. went to look at Brandi and Jose's washing machine that day. (RP 413). But, they were leaving when he got there, so he left. (RP 414). He saw the van, but did not see Mr. Brown. (RP 414-15). The green van was leaving at the same time as Mr. Mohr, Jr.; he did not see the van stop at Sally and J.J.'s trailer. (RP 417).

2. Mike Anderson

Michael Anderson lived in a trailer by Lucky's gun shop. (RP 64). He testified that he didn't talk to the police the day of the fire, but contacted them later, after he was kicked off the property because Brandi was causing trouble for him and saying that he was ripping people off. (RP 70). After that, he told the police that Mr. Brown came to his property, took his gasoline without asking or paying for it, took a towel, ripped it in half, and walked away. (RP 66-68). He never asked Mr. Brown why he was taking the gas and he never confronted him. (RP 80).

Mr. Anderson's testimony was confusing. According to Mr. Anderson, he first saw Mr. Brown on the property in the afternoon, with his girlfriend, Enda Ferry. (RP 83). Mr. Anderson testified that Mr. Brown came back to the property and got gas while Brandi and Jose were

still there. (RP 80). Mr. Brown left when Ms. Ferry, Brandi, and Jose left, around 4:30 or 5:00. (RP 83). Then, he came back, alone, either an hour to an hour and a half or thirty to forty minutes later. (RP 80, 83). He testified the fire started around 4:30 or 5:00. (RP 81).

3. Gary Brown (aka Gary Taylor)

The day of the fire, Mr. Brown told police that he had been with Edna Ferry. (RP 133). They went to Brandi and Jose's to get a part for a chainsaw, but Brandi and Jose were leaving, so they only spoke briefly and then left. (RP 133). After that, Mr. Brown and Ms. Ferry went home, got some money, and then went to the store, where they saw Deputy Gibson, on his way to the fire. (RP 133).

4. Confession

a. William Snodgrass

Sometime after the fire, Mr. Snodgrass gave Mr. Brown a ride. (RP 313). He testified that he didn't remember what Mr. Brown told him. (RP 313). He reviewed a statement he had previously made to police, but stated that he still did not remember. (RP 316-17).

At that point, the Judge excused the jury and instructed the prosecutor on how to proceed with the witness:

> You have passed up refreshing his recollection about fifteen minutes ago. I granted you permission to treat him as a hostile witness. Take the statement from him, and read

> it to him, and ask him if that's what he told detective Wallace. Do something besides continuing to just run around in circles here, and have him be evasive. We are not getting anywhere. There is a way for you to impeach him with that statement, and I want you to do so.

(RP 318).

In response to the State's questions, Mr. Snodgrass then testified that the defendant told him the police wanted to arrest him and asked him to get him out of the area. (RP 319). Mr. Snodgrass then testified about what was in his statement:

> Q: So, on the way, you told Detective Wallace that the defendant said that he had effed up and caught a house on fire; isn't that right?
>
> A: Something like that.

(RP 319).

> Q: So -- and he told you he did it in exchange for a truck, right?
>
> A: I don't recall what he said about why he did it.
>
> Q: But that's what's in your statement to Detective Wallace, right?
>
> A: I guess that's what I read.

(RP 320).

The prosecutor continued to question Mr. Snodgrass about his statement, and Mr. Snodgrass continued to say he didn't remember, but, yes, it was in his statement. He was asked if Mr. Brown identified Sally

and J.J.'s trailer as the one he burned; Mr. Snodgrass responded I guess and I'm not sure, but acknowledged that was in his statement. (RP 321). He was asked if Mr. Brown told him that Ms. Ferry dropped him off and he responded, "I don't recall whether he said that or not." (RP 321). He was asked if that was in his statement and continued to say he didn't remember what Mr. Brown said. (RP 321-22). He was asked if Mr. Brown told him they used gasoline and he responded, "I don't recall them saying that he used gas." (RP 322). He was asked if Mr. Brown was mad at Ms. Ferry, and again, said, "I don't have no idea about that. I don't know. I don't know what their problem was. I don't recall." (RP 322).

Mr. Snodgrass did not write the statement; an officer wrote it for him. (RP 323). He didn't recall if he read it or not. (RP 323).

Mr. Snodgrass' written statement was admitted into evidence, over objection. (RP 334-35, Exh. 57). The court held it was not hearsay, and that it was inconsistent with his testimony. (RP 335-36). During Detective Wallace's testimony, the officer summarized the statement again. (RP 336).

b. Edna Ferry

Edna Ferry was Mr. Brown's girlfriend. (RP 85). Her van was seen near the trailer before the fire. (RP 21-22).

Originally, Ms. Ferry told the police that she and Mr. Brown went

to Jose and Brandi's to get a part for a chainsaw, that Mr. Brown got out of the van, talked to them, got back in the van, and they left together. (RP 94, 97). She denied being involved. (RP 185). When police came to her house after the fire, Ms. Ferry consented to a search of her van. (RP 185). Police did not find anything of evidentiary value in the van. (RP 185).

Later, police came to Ms. Ferry's house, told her she was going to be arrested, and to call someone to get her kids. (RP 330-31). The officer told her she could be a witness or a suspect. (RP 331). She then gave a statement that she had dropped Mr. Brown off at the trailer. (RP 331). Her kids were there when she gave the statement, she was holding one of them, and she was crying. (RP 338). She was told that she would not be charged if she testified. (RP 339).

At trial, Ms. Ferry testified that she went to Brandi and Jose's that day with Mr. Brown; she left and he stayed. (RP 87). It was around 4:00. (RP 87). She testified that he asked her about the gas cans in her van, but she told him nothing was leaving the van. (RP 88). She testified that she left to pick up her son and then later picked up Mr. Brown walking a half mile from the trailer, wet. (RP 89-90). According to Ms. Ferry, Mr. Brown told her that there had been a discussion between him, Brandi, and Jose about burning down the trailer. (RP 91). Defense counsel objected as to hearsay; the objection was overruled. (RP 92). Ms. Ferry testified

that Brandi and Jose told Mr. Brown that they wanted J.J. and Sally out of there. (RP 91).

5. J.J. Haskey and Sally Emery

On the day of the fire, J.J. and Sally walked to Bruce Brown's to borrow tools and had coffee at 4:30. (105, 138, 148). When they were walking to Bruce Brown's, they saw Mr. Brown and Ms. Ferry. (RP 143). Mr. Haskey testified that Mr. Brown flipped him off. (RP 144). He told the police that Ms. Ferry was driving, but testified that Mr. Brown was driving. (RP 154).

Bruce Brown then gave J.J. and Sally a ride to the store. (RP 106). On the way, they saw Ms. Ferry and Mr. Brown and waved; Ms. Ferry was driving. (RP 106). When they were at the store, someone told them the house was on fire. (RP 106). They drove back to the trailer and saw that it was on fire. (RP 107).

According to J.J., he was friends with Jose, but didn't like Brandi. (RP 136). Sally testified that she got along with her neighbors and had no problems with them. (RP 159-60).

When asked what happened to her mobile home, Sally answered "Gary burned it." (RP 159). Defense counsel objected and moved to strike; it was overruled. (RP 159). Later, after several other witnesses testified, the court reconsidered and instructed the jury to disregard the

statement. (RP 242-44)

> Ladies and gentleman, . . . I want to go back to some earlier testimony this morning when Sally Emery was testifying. At one point, she made a statement that – to the effect that Gary Brown had burned her trailer, and there was an objection to it, I overruled the objection, I am now toing to sustain the objection. I am going to strike that portion of her testimony from the record. So you should not consider that, or discuss it during deliberations later in this case.

(RP 244).

6. Diana Norris

Diana Norris was three driveways away when the trailer was burning. (RP 172-73). Sally Emery told police that Ms. Norris had a problem with her. (RP 172-73). Sally was asked if Ms. Norris threatened to burn her house. (RP 173). She responded that Ms. Norris had threated to burn her stuff, not her house. (RP 173). Defense counsel then attempted to impeach her:

> Q: You didn't make a statement to the officers saying that Miss Norris was going – threatened to burn down your trailer?
>
> A: She said she was going to burn my stuff, her and Brandi Haley coaxed Gary Taylor into doing it.

(RP 173). Defense counsel objected and moved to strike, which was granted. (RP 173).

Ms. Emery also told police that Ms. Norris had a hit on her and made statements after the fire about her not being dead. (RP 173-74).

7. Trailer

The trailer had three doors, but you could only access the trailer through the sliding glass door. (RP 141). The sliding glass door was locked and had a stick in the door track to prevent someone from opening it. (RP 142).

J.J. Haskey testified that he had replaced the flooring, so it was just plywood at the time. (RP 137). He testified that there was a stove, but there was no wood and it wasn't lit. (RP 145). He also testified that there were no candles lit or other heating appliances. (RP 145).

8. Firefighters and Investigators

a. Joe Mohr

Joe Mohr was the first firefighter to arrive. (RP 47-48). He opened the sliding glass door to get water inside the trailer. (RP 59). The sliding glass door was not broken. (RP 59).

Mr. Mohr had been a volunteer firefighter for twelve years. (RP 45-47). He had responded to eight to ten trailer fires in that time. (RP 49). His training was limited to learning from more senior firefighters. (RP 49). Defense counsel objected to Mr. Mohr giving an opinion about the fire, as he did not qualify as an expert. (RP 48, 50). Although the court expressed concerns that Mr. Mohr was not an expert, the court overruled the objection, stating that Mr. Mohr was allowed to testify as to

what he saw in this fire, how it differed from other fires he's seen, and how fires typically burn. (RP 50-53).

Mr. Mohr then proceeded to testify that when a fire starts from a stove or electrical problems, the whole trailer goes up quickly. (RP 56-57). But, in this case, the trailer burned mostly in one area, which indicates that someone started the fire. (RP 57). He also testified that when he used his hose, the fire moved, which he has seen in cases where a fire was started with diesel. (RP 57).

b. Jason Wecker

Jason Wecker was one of the fire investigators in this case. (RP 186). Mr. Wecker had been a fire investigator since 2013, he had never been the lead fire investigator and he wasn't in this case. (RP 223, 228-29). The lead fire investigator did not testify at trial. His training prior to this investigation consisted of one forty-hour class. (RP 229).

Lieutenant James Sande, a fire investigator with the Grays Harbor fire department, also assisted with the investigation. (RP 253). He had also been a fire investigator since 2013. (RP 260).

Mr. Wecker testified that the roof collapsed and all the studs in the center of the living room ceiling had been burned. (RP 196, 208). There was a wood stove with a partially burned log in it. (RP 209). They ruled out the stove based on what the witnesses said and based on the

unlikelihood that a log falling out of the stove would have caused the fire. (RP 209, 269, 271-72). They looked at the electrical panel, and ruled it out because there was nothing obviously wrong with it and the fire was not in that location. (RP 209-10).

During their excavation, they uncovered clean glass under other debris, which they concluded meant that the sliding glass door was broken before the fire. (RP 211-12). After they cleared the large debris, they washed the floor with a fire hose. (RP 241). On the floor they observed what appeared to be a pour pattern, which indicates that a liquid accelerant was used. (RP 214-15).

They took samples of the flooring after the floor was washed. (RP 241). They took four samples from the living room, where they believed the fire started, and a control sample, from a bedroom. (RP 238). However, the manual used by fire investigators says that if you wash the area, you should take samples first. (RP 246).

The four samples from the living room were negative for hydrocarbons, or gasoline. (RP 301). The sample from the bedroom was positive. (RP 301). Lieutenant Sande testified that the lab results were odd and inconsistent with their other findings. (RP 309).

Mr. Wecker testified that, in his opinion, the fire started in the center of the trailer with an accelerant. (RP 222). However, he could not

determine what materials were ignited and what the ignition source was. (RP 234-44). Also, Mr. Weeker completed his report before the lab results came back and he did not review the lab results, finding that no gasoline was present. (RP 240).

c. Defense Expert, John Scrivner

John Scrivner testified as a defense expert. (RP 350). He had been a fire investigator for forty years, investigated 670 fires, and had testified as an expert in twelves states. (RP 350-56). He reviewed the other reports in this case, photos, and witness statements. (RP 356). He testified that he did not agree with the other investigators' findings. (RP 360).

First, the investigators were unable to determine the ignition source and what materials were ignited first. (RP 360-61). According to the manual used as a standard for fire investigation, if you cannot determine an ignition source and materials, the cause of the fire must be "undetermined." (RP 361).

Second, the living room is not necessarily where the fire started. They improperly sprayed the floor with a fire hose, which could have destroyed evidence, including an ignition source. (RP 361). He testified that he has never seen anyone do that in his career. (RP 378). Mr. Scrivner testified that often the area with the most burning is not where the fire started. (RP 374-75). A fire can start in one part of the structure and

then move. (RP 375). Also, the burn patterns indicate a fire could have started in the ceiling, burned, and then fell to the floor. (RP 372).

Third, they did not appropriately rule out other causes. He testified that this could have been an electrical fire. The investigators only looked at the electrical box, not the wiring. (RP 364). There was a wall that was burned through and the burn pattern was consistent with an electrical fire. (RP 364-65). The investigators should have taken the electrical box, recorded the type of box, and checked the wires in the burn area by hand for arcing, a sign that the fire started in the wiring. (RP 366, 369).

The fire also could have been caused by the stove. The investigators only ruled out a fire starting from a log falling out of the stove. But, the stove had a single wall pipe, which is a code violation. (RP 367). Single wall piping is no longer allowed because there were too many fires and the pipe needs to be insulated from combustibles. (RP 402). Wood fires are generally caused by improper installation of piping or placement. (RP 371). It appeared from pictures that the pipe went to the ceiling. (RP 372). If the fire started in the ceiling, burned, and fell to the floor, it would cause the same burn pattern as those in the trailer. (RP 372).

The manual that fire investigators rely on no longer allows fire investigators to conclude that a fire was "incendiary" just because there is

no other explanation; there must be evidence that supports a finding of "incendiary." (RP 386-87). Mr. Scrivner testified that, in his opinion, the cause of the fire was unknown. (RP 385-86).

I. ARGUMENT

1. Mr. Snodgrass' Statement Regarding Mr. Brown's Confession Was Improperly Admitted as Impeachment Evidence, When He Repeatedly Testified that He Did Not Remember Mr. Brown's Statement.

a. *Mr. Snodgrass' Statement Was Not a Prior Inconsistent Statement.*

The trial court improperly admitted Mr. Snodgrass' prior statement that Mr. Brown admitted to burning the trailer, when he repeatedly testified that he did not remember what Mr. Brown told him.

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. *State v. Magers,* 164 Wash.2d 174, 181, 189 P.3d 126 (2008). A trial court abuses its discretion "when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." *State v. Blackwell,* 120 Wash.2d 822, 830, 845 P.2d 1017 (1993). However, appellate courts review the interpretation of evidentiary rules de novo. *State v. DeVincentis,* 150 Wash.2d 11, 17, 74 P.3d 119 (2003).

"Hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the

truth of the matter asserted." ER 801(c). Hearsay is inadmissible unless a specific exception applies. ER 802. Prior inconsistent statements are admissible, and not hearsay, only if they are offered to challenge the declarant's credibility rather than for the truth of the matter asserted. *State v. Williams,* 79 Wash.App. 21, 26, 902 P.2d 1258 (1995). Prior inconsistent statements may only be used to show that a witness's trial testimony is not believable because the witness tells different stories at different times. *State v. Gromus*, 154 Wash. App. 1055 (2010); *State v. Newbern,* 95 Wash.App. 277, 293, 975 P.2d 1041 (1999). However, prior inconsistent statements may not be used as substantive evidence that the facts contained in the statements are true. *Gromus*, 154 Wash. App. 1055; *State v. Burke,* 163 Wash.2d 204, 219, 181 P.3d 1 (2008).

Therefore, a witness can only be impeached when their credibility is at issue. ER 401, *State v. Allen S.*, 98 Wash. App. 452, 459-60, 989 P.2d 1222, 1226-32 (1999). Credibility is not at issue when a witness refuses to testify, testifies that they do not remember, or otherwise does not provide any substantive testimony. "If a witness does not testify at trial about the incident, whether from lack of memory or another reason, there is no testimony to impeach." *Allen S.*, 98 Wash. App. at 462 (internal citations omitted). When a witness does not provide substantive testimony, "the impeaching party's purpose cannot be impeachment, and

its 'primary purpose'—indeed, its *only* purpose—is to admit the evidence for substantive use." *Id.* at 465.

> The mere fact that a witness has failed to testify as expected does not warrant impeaching him by proof of prior statements in conformity to what he was expected to testify; but proof of prior contradictory statements of a party's own witness is admissible only where the witness has given affirmative testimony, hostile or prejudicial, to the party by whom he was called; and in such case the proof must be confined to contradictions of the testimony of the witness which is injurious to the party seeking to impeach him.'

State v. Delaney, 161 Wash. 614, 618-19, 297 P. 208, 210 (1931)

The facts in *State v. Allen S.* are almost identical to this case. In *Allen S.*, the prosecutor anticipated that the witness may refuse to testify or claim to not remember incriminating statements that the defendant made to him. *Id.* at 456-57. The witness had previously been interviewed and told law enforcement that the defendant made incriminating statements. *Id.* The court instructed the prosecutor to call their witness and if he denied that any statement were made by the defendant, impeach him by asking him about the statement he gave to law enforcement and have the officer testify about the statements that the witness previously made. *Id.* at 457.

The State then called the witness, who repeatedly denied any memory of a conversation with the defendant. *Id.* The State impeached

the witness by reciting the statements he made to law enforcement, each of which he denied any memory of. *Id.* The State also called the officer, who testified as to the statement the witness gave regarding the defendant's statement. *Id.* On appeal, this Court reversed the conviction, holding that the trial court erred by admitting the prior statement. *Id.* at 468-69.

In *State v. Allen S.*, this Court discussed five cases that established when impeachment with a prior inconsistent statement is not appropriate.

In *State v. Robbins*, the witness refused to testify. *State v. Robbins,* 25 Wash.2d 110, 169 P.2d 246 (1946). The Supreme Court noted that impeachment with a prior statement was not appropriate because there was nothing to impeach.

In *State v. Washburn*, our Supreme Court affirmed the trial court's refusal to allow impeachment evidence when the witness' testimony had been stricken. *State v. Washburn,* 116 Wash. 97, 99, 198 P. 980 (1921).

In *State v. Stingley*, two witnesses were called and asked only about their prior statements. *State v. Stingley*, 163 Wash. 690, 2 P.2d 61 (1931). The witnesses claimed to not remember anything they were asked about and were impeached with their prior statements. *Id.* The court reversed the conviction, noting that "[t]his kind of hearsay testimony and

so-called impeachment has been condemned by this court uniformly a number of times." *Id.* at 697.

In *State v. Delaney*, the witness said he did not remember anything. *State v. Delaney*, 161 Wash. 614, 619, 297 P. 208 (1931). The witness was then impeached with a prior statement. *Id.* Our Supreme Court reversed the conviction because the witness "had not made an affirmative statement of any admissible evidentiary fact favorable to the defense, or unfavorable to the prosecution, which called for contradiction by impeachment or otherwise." *Id.* at 618-19.

Finally, in *Kuhn v. United States*, the witness testified that he could not remember, and was impeached with a prior statement. *Kuhn v. United States*, 24 F.2d 910 (9th Cir.), *cert. denied by Lee v. U.S.*, 278 U.S. 605, 49 S.Ct. 11, 73 L.Ed. 533 (1928). The Ninth Circuit stated that "where [a person] gives no testimony injurious to the party calling him, but only fails to render the assistance which was expected by professing to be without knowledge on the subject, there is no reason or basis for impeachment...." *Id.* at 913.

In this case, Mr. Snodgrass testified that he did give Mr. Brown a ride, but that he did not remember their conversation during the ride. He also reviewed a statement he had made to police, which did not refresh his recollection. He repeatedly denied having any memory of the statement

Mr. Brown made to him and provided no substantive testimony. Nonetheless, the trial court allowed the State to impeach Mr. Snodgrass with his prior statement, reading each statement into the record and asking him whether he made the statements. The State also called Detective Wallace to impeach Mr. Snodgrass, by reiterating the statement that he had made. And, the court admitted the statement itself into evidence, so the jury could review the statement during deliberations.

The facts of this case are indistinguishable from the cases discussed above. Mr. Snodgrass gave no substantive testimony. He claimed, repeatedly, to not remember what Mr. Brown told him. Therefore, there was no testimony to impeach. His credibility was not at issue. The prior statement should not have been admitted and was extremely prejudicial; therefore, this case must be reversed and remanded for a new trial.

b. *Mr. Snodgrass' Statement Was Improperly Admitted as Substantive Evidence.*

As argued above, Mr. Snodgrass' statement was not a prior inconsistent statement and should not have been admitted. However, even if it was admissible, it should have only been admitted as impeachment evidence, not as substantive evidence.

A prior inconsistent statement is admissible for impeachment only and cannot be used as substantive evidence of guilt. *See State v. Johnson*, 40 Wash.App. 371, 377, 699 P.2d 221 (1985). It can only be used to challenge the credibility of a witness. Id.

In this case, the court admitted the statement as a prior inconsistent statement. However, this was done outside the presence of the jury. (RP 318). And, the jury was never instructed that the evidence was admissible for impeachment only. (CP 33-38). Therefore, it is likely that the jury improperly consider Ms. Snodgrass' statement as substantive evidence of Mr. Brown's guilt.

2. The Trial Court Improperly Assumed the Role of Prosecutor, in Violation of the Separation of Powers and Due Process, When the Court Instructed the State on How to Impeach Its Witness.

The trial court improperly assumed the role of prosecutor when it instructed the State on how to impeach its witness, in violation of the separation of powers and due process. Although defense counsel did not object at trial, manifest errors effecting constitutional rights may be raised for the first time on appeal. RAP 2.5(a)(3). Because a judge instructing the State on how to impeach a witness is a manifest error effecting the constitutional rights of separation of powers and due process, this court should consider this issue on appeal.

"The doctrine of separation of powers, implicit in our state constitution, divides the political power of the people into three co-equal branches of government." *City of Fircrest v. Jensen*, 158 Wn.2d 384, 393, 143 P.3d 776 (2006). "The judicial branch violates the doctrine when it assumes tasks that are more properly accomplished by other branches." *Hale v. Wellpinit School Dist. No. 49*, 165 Wn.2d 494, 506, 198 P.3d 1021 (2009) *citing Carrick v. Locke*, 125 Wn.2d 129, 136, 882 P.2d 173 (1994); *quoting Mistretta v. United States*, 488 U.S. 361, 383, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989); *Morrison v. Olson*, 487 U.S. 654, 680-61, 108 S. Ct. 2597, 101 L.Ed.2d 569 (1988). "The judiciary's image of impartiality and the concomitant willingness of the public to accept its decisions as those of a fair and disinterested tribunal may be severely damaged when a court in effect initiates and tries its own lawsuits." *Id.* (*citing In re Salary of the Juvenile Dir.*, 87 Wn.2d 232, 249, 552 P.2d 163 (1976)). "One of the rights secured to an accused person by the law of the land is that his accuser shall not be at the same time his judge." *State ex rel. Barnard v. Board of Educ. of City*, 19 Wash. 8, 17, 52 P. 317 (1898) (*citing People v. Board of Trustees*, 4 A.D. 399, 39 N.Y.S. 607 (1896)). "The principle of impartiality, disinterestedness, and fairness on the part of the judge is as old as the history of courts." *Id.* The law requires not only that a judge is

fair and impartial, but that the judge appears fair and impartial. *State v. Madry*, 8 Wn.App. 61, 70, 504 P.2d 1156 (1972).

The U.S. Supreme Court recognized such ills brought on by one State's judge-as-grand-jury system, wherein a court could subsequently adjudicate allegations that arose from its own investigation. *In re Murchison*, 349 U.S. 133, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955). The Supreme Court remarked that "it would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations." *Id.* at 137. "Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused." *Id.*

Furthermore, "[a] fair trial in a fair tribunal is a basic requirement of due process . . . ." *State v. Moreno*, 147 Wash. 2d 500, 507, 58 P.3d 265, 268 (2002); *see also* U.S. CONST. amend. IV, XIV.

In *State v. Moreno*, our Supreme Court cited *People v. Copflied* as an example of the court improperly taking on the role of prosecutor:

> Again, in *People v. Cofield,* 9 Ill.App.3d 1048, 293 N.E.2d 692 (1973), the court took too great a role in a child abuse prosecution. When the 13-year-old victim testified differently from her police statement, the judge called the investigating officer to the stand to present her prior statement, and said:

> "Why are you lying to me now?" He reminded her that she was under oath and again asked her if the defendant touched her .... he further stated that he would "send her to the Audy Home and take her in custody" if she did not tell the truth. Deborah answered that defendant did grab her.

Moreno, 147 Wash. 2d at 511.

In this case, the court interrupted the State's questioning of its witness, Mr. Snodgrass, and advised the State how to proceed:

> You have passed up refreshing his recollection about fifteen minutes ago. I granted you permission to treat him as a hostile witness. Take the statement from him, and read it to him, and ask him if that's what he told detective Wallace. Do something besides continuing to just run around in circles here, and have him be evasive. We are not getting anywhere. There is a way for you to impeach him with that statement, and I want you to do so.

(RP 318). The court improperly instructed the prosecutor how to question its witness in violation of the separation of powers and due process, which denied Mr. Brown his constitutional right to a fair trial. Therefore, the conviction should be reversed.

3. Prosecutorial Misconduct.

A claim of prosecutorial misconduct can be raised and considered for the first time on appeal if the prosecutor's actions "were 'so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct.'" *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988) (internal citations omitted).

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the conduct was improper and that it prejudiced her defense. *State v. Harvey*, 34 Wn. App. 737, 740, 664 P.2d 1281 (1983), *review denied,* 100 Wn.2d 1008 (1983).

"Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial." *In re Glasmann*, 175 Wash. 2d 696, 703-04, 286 P.3d 673, 677 (2012); *State v. Davenport,* 100 Wash.2d 757, 762, 675 P.2d 1213 (1984); *see also* WASH. CONST. art I, § 21, U.S. CONST. amend. VI, XIV.

A defendant's constitutional right to a fair trial is violated when there is a substantial likelihood that improper comments affected the jury's verdict. *State v. Jungers*, 125 Wn.App. 895, 106 P.3d 827 (2005).

> Generally, improper prosecution argument, even when indirectly touching upon a constitutional right, is tested by whether the prosecution argument is so flagrant and ill-intentioned as to create incurable prejudice . . . . However, if the alleged misconduct is found to directly violate a constitutional right . . . then "it is subject to the stricter standard of constitutional harmless error."

State v. French, 101 Wn. App. 380, 385-386, 4 P.3d 857 (2000) (internal citations omitted).

a. *The State Improperly Called Mr. Snodgrass for the Primary Purpose of Impeaching Him.*

The State committed prosecutorial misconduct when it called Mr. Snodgrass as a witness for the sole purpose of admitting his prior statement. "Although the State may impeach its own witness, it may not call a witness for the primary purpose of eliciting testimony in order to impeach the witness with testimony that would be otherwise inadmissible." *State v. Hancock*, 109 Wash. 2d 760, 763-64, 748 P.2d 611, 613 (1988), *citing State v. Lavaris*, 106 Wash.2d 340, 721 P.2d 515 (1986), *quoting State v. Barber*, 38 Wash.App. 758, 770–71, 689 P.2d 1099 (1984), rev. denied, 103 Wash.2d 1013 (1985).

> The underlying concern is that prosecutors may abuse the rule by calling a witness they know will not provide useful evidence for the primary purpose of introducing hearsay evidence against the defendant. This tactic seeks to exploit a jury's difficulty in making the subtle distinction between impeachment and substantive evidence. The motivation in such instances is less to impeach the witness than to introduce hearsay as substantive evidence, contrary to ER 802.

Id. at 763 (internal citation omitted).

Our Supreme Court noted that when a witness' "testimony simply consist[s] of flat denials . . ., without offering any affirmative testimony," it suggests that the State improperly called the witness to admit otherwise inadmissible hearsay. *Hancock*, 109 Wash. 2d at 765.

In this case, the State called Mr. Snodgrass. Mr. Snodgrass did not provide any substantive testimony regarding this case. Instead, he repeatedly testified that he did not recall what was said during his conversation with Mr. Brown. Nonetheless, the State continued to question him, using inadmissible hearsay to impeach him. Without calling Mr. Snodgrass, the State would not have been able to admit his prior statement. Furthermore, the jury was never instructed that the statement could only be used for impeachment and the State used the statement as substantive evidence.

b. *The State Improperly Argued Impeachment Evidence as Substantive Evidence.*

Impeachment evidence cannot be used as substantive evidence of guilt. *See Johnson*, 40 Wash.App. at 377. It can only be used to challenge the credibility of a witness. *Id.*

As discussed above, the State may not use impeachment as a guise to admit otherwise inadmissible hearsay, exploiting "the jury's difficulty in making the subtle distinction between impeachment and substantive evidence." *State v. Clinkenbeard*, 130 Wash. App. 552, 569-70, 123 P.3d 872, 881 (2005), *citing State v. Babich*, 68 Wash.App. 438, 444, 842 P.2d 1053 (1993); *Hancock*, 109 Wash.2d at 763. The State cannot argue impeachment evidence as substantive evidence to the jury. *Id.* at 570-71.

It is reversible error for the State argues that evidence that was admitted for impeachment purposes is substantive evidence of guilt. *Id.* at 571.

In this case, the State explicitly argued that Mr. Snodgrass' statement, which had been admitted as impeachment evidence, was evidence of Mr. Brown's guilt:

> But that's not all. Because you also heard, well, Mr. Snodgrass, again, an extremely reluctant witness, his statement, which is in evidence, and you will get to read it. Says that he picked the defendant up about -- some time in May, he says about a month ago, and gave him a ride to Aberdeen. . . . The defendant told him that he saw the police coming down the drive way, and he ducked into the garage to avoid them. The defendant told him, he asked me to get him out of the area. I agreed to take Gary to Aberdeen to one of his friends' house. While driving to town, I asked Gary why the police wanted him for arson. Gary told me that he effed up and that he caught a house on fire for somebody in trade for a truck. Gary told me the guy, named Jose, was going to give him a truck for burning out the neighbors next to his trailer. I knew there was a fire in a trailer on Kirkpatrick Road, just down from the Humptulips Store. Gary verified that was the trailer that burnt down. Gary told me that Edna Ferry had dropped him off at the location, and he caught the trailer on fire, and Gary told me that he used gasoline to burn the trailer down. You can read it. Well, I think you can read Detective Wallace's handwriting, but it's there for you to review.
>
> So, again, this is a statement that somebody, who is apparently a friend of the defendant's gave, doesn't want to repeat it while the defendant is sitting right there.

(RP 431-32).

In addition, the State argued that Mr. Brown was paid to burn down the trailer, which again, was arguing Mr. Snodgrass' statement as substantive evidence of guilt:

> And that goes together with the fact that the person that owned that van, Edna Ferry said that the defendant was going there to do a job, to burn the place down, because what they had paid them, which is exactly what Andrew Snodgrass told Detective Wallace, that the defendant had said, which matches up with what Mr. Anderson said, seeing the defendant with the gas the same day, the same afternoon that that trailer went up.
>
> Folks, all the evidence is pointing to one thing, and it's not an act of God, it's the defendant.

(RP 437).

The State improperly argued impeachment evidence as substantive evidence. The jury was likely confused, especially because they were never instructed that the statement was admitted only for impeachment evidence. And, the court's ruling, that the statement was admissible as impeachment, was done outside the presence of the jury. (RP 318).

c. No Curative Instruction Could Have "Unrung the Bell."

This court should consider the issues of prosecutorial misconduct on appeal because the State's conduct, as discussed above, was flagrant and ill-intentioned. Furthermore, no curative instruction could have cured the error or "unrung the bell" once the jury heard Mr. Snodgrass' statement and the State's improper argument.

While there is a possibility that a curative instruction can mitigate the taint of an improperly admitted confession, "the bell is hard to unring." *State v. Holmes*, 122 Wash. App. 438, 446, 93 P.3d 212, 217 (2004). "Counsel must gamble on whether to object and ask for a curative instruction—a course of action which frequently does more harm than good—or to leave the comment alone." *Id., quoting State v. Curtis*, 110 Wash. App. 6, 15, 37 P.3d 1274 (2002).

In this case, the Mr. Snodgrass' statement was so prejudicial that no curative instruction could have cured the errors. Therefore, this court should consider this issue for the first time on appeal.

4. Mr. Brown Was Unfairly Prejudiced by Improper Statements Regarding His Guilt and the Trial Court's Instructions to Disregard the Statements Were Insufficient to "Unring the Bell."

Sally Emery improperly testified, twice, that Mr. Brown burned down her trailer. Both statements were objected to, and both were ultimately sustained and the jury instructed to disregard or told the statement was stricken. However, given the extremely prejudicial nature of the statements, the trial court's rulings were insufficient to "unring the bell."

"The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and

article I, section 22 of the Washington State Constitution." *In re Glasmann*, 175 Wash. 2d 696, 703-04, 286 P.3d 673, 677 (2012), *citing Estelle v. Williams,* 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *State v. Finch,* 137 Wash.2d 792, 843, 975 P.2d 967 (1999); *see also* WASH. CONST. art I, § 21, U.S. CONST. amend. VI, XIV.

Furthermore, the right to have factual questions decided by the jury is crucial to the right to trial by jury. WASH. CONST. art I, §§ 21, 22, U.S. CONST. amend. VII. "The role of the jury is to be held 'inviolate' under Washington's constitution." *State v. Montgomery*, 163 Wash. 2d 577, 590, 183 P.3d 267, 273 (2008). Opinion testimony is inappropriate when a witness is commenting on the guilt of the accused. *Id.* at 591. Such impermissible opinion testimony about a defendant's guilt may constitute reversible error because it violates the defendant's constitutional right to a jury trial, which includes independent determination of the facts by the jury. *State v. Kirkman*, 159 Wash. 2d 918, 927, 155 P.3d 125, 130 (2007).

In this case, Sally Emery improperly testified that Mr. Brown was guilty. When asked what happened to her mobile home, Sally answered "Gary burned it." (RP 159). Defense counsel objected and moved to strike; it was overruled. (RP 159). Later, after several other witnesses testified, the court reconsidered and instructed the jury to disregard the statement. (RP 242-44)

> Ladies and gentleman, . . . I want to go back to some earlier testimony this morning when Sally Emery was testifying. At one point, she made a statement that – to the effect that Gary Brown had burned her trailer, and there was an objection to it, I overruled the objection, I am now toing to sustain the objection. I am going to strike that portion of her testimony from the record. So you should not consider that, or discuss it during deliberations later in this case.

(RP 244).

Ms. Emery again testified that Mr. Brown was guilty:

> Q: You didn't make a statement to the officers saying that Miss Norris was going – threatened to burn down your trailer?
>
> A: She said she was going to burn my stuff, her and Brandi Haley coaxed Gary Taylor into doing it.

(RP 173). Defense counsel objected and moved to strike, which was granted. (RP 173).

In *State v. Miles*, 73 Wn.2d 67, 436 P.2d 198 (1968), a Spokane police officer was asked to relate a message that had been received from the Yakima County sheriff's office, which was the basis for the defendant's arrest. *Id.* at 68, 436 P.2d 198. Over defense counsel's objection that the answer would be hearsay, the court allowed the officer to answer, stating that the testimony was not offered to prove the truth of the matter contained therein. *Id.* The officer then testified that the message described two wanted subjects out of Yakima County and a wanted car, and stated that they were headed for Spokane to commit

another robbery. *Id.* The trial court instructed the jury to disregard the testimony. *Id.* at 69.

The *Miles* court reversed, finding that the court's instruction was insufficient to remove the prejudicial effect of the officer's testimony. *Id.* at 70. "The question in all cases, is not whether the court, if trying the case, would disregard the obnoxious evidence but whether the court is assured that the jury has done so." S*tate v. Suleski*, 67 Wn.2d 45, 51, 406 P.2d 613 (1965), quoting *State v. Meader*, 54 Vt. 126, 132 (1881). Because the testimony was so "inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors" (*Miles*, 73 Wn.2d at 71) it cannot be assumed that the jury could disregard the testimony.

In this case, although the trial court ultimately sustained the objections and either struck the testimony or instructed the jury to disregard the testimony, the jury heard both of the statements. The statements were especially prejudicial because the trial court originally overruled the objection and did not correct itself until after several other witnesses testified. Also, Sally Emery implied she had additional information about a conspiracy to burn down the trailer that was not admitted in evidence and involved witnesses who did not testify at trial. The trial court's rulings were insufficient to "unring the bell," and thereby denied Mr. Brown of his right to a fair trial by jury.

5. Mr. Brown Received Ineffective Assistance of Counsel Because Counsel Failed to Properly Object to the Use of Mr. Snodgrass' Statement, Failed to Request a Limiting Instruction, and Failed to Request a Mistrial.

To establish ineffective assistance of counsel, the defendant must establish that his attorney's performance was deficient and the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Deficient performance is performance falling "below an objective standard of reasonableness based on consideration of all the circumstances." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Reasonable conduct for an attorney includes carrying out the duty to research the relevant law. *Strickland*, 466 U.S. at 690-91. The prejudice prong requires the defendant to prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988).

In this case, defense counsel did not object to the admission of Mr. Snodgrass' statement on the basis that it was not a prior inconsistent statement, did not object to the State's use of impeachment evidence as substantive evidence, and did not request a limiting instruction, instructing

the jury that Mr. Snodgrass' statement could be considered only for impeachment purposes.

In addition, defense counsel was ineffective for failing to request a mistrial after Sally Emery repeatedly and improperly testified that Mr. Brown set her trailer on fire. Although defense counsel properly objected, and the objections were ultimately sustained, the prejudicial effect could not be "unrung." Therefore, defense counsel should have requested a mistrial.

Mr. Snodgrass' statement and Sally Emery's testimony that Gary Brown burned her trailer were inadmissible, highly prejudicial, and likely effected the verdict in this case. Therefore, counsel's failure to object and request a limiting instruction was clearly unreasonable.

6. The Trial Court Improperly Allowed Ms. Ferry to Testify Regarding Double Hearsay, in Violation of the Confrontation Clause.

The trial court improperly admitted double hearsay, in violation of the evidence rules and the confrontation clause, when it allowed Ms. Ferry to testify that Mr. Brown told her that he had had a conversation with Brandi and Jose about burning down the trailer and that Brandi and Jose said they wanted J.J. and Sally out of there, over defense objection.

In this case, defense counsel objected as to hearsay. Defense counsel did not specifically object under the confrontation clause.

However, manifest errors effecting constitutional rights may be raised for the first time on appeal. RAP 2.5(a)(3).

a. *Ms. Ferry's Testimony Involved Inadmissible Double Hearsay.*

A trial court's interpretation of evidentiary rules is reviewed de novo. *Alvarez-Abrego, 154 Wash. App. 351, 361-62, 225 P.3d 396, 401 (2010), citing State v. Foxhoven*, 161 Wash.2d 168, 174, 163 P.3d 786 (2007). If the trial court's interpretation of the rules is correct, we determine if admission of the evidence was an abuse of discretion. *Foxhoven*, 161 Wash.2d at 174. A trial court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds. *Id.*

"'Hearsay'" is 'a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'" ER 801(c). Hearsay is inadmissible unless there is an exception. ER 802. "In instances of multiple hearsay, each level of hearsay must be independently admissible." State *v. Alvarez-Abrego*, 154 Wash. App. at 366; *citing* ER 805.

At trial, Ms. Ferry testified that Mr. Brown told her that there had been a discussion between him, Brandi, and Jose about burning down the trailer. (RP 91). Defense counsel objected as to hearsay; the objection

was overruled. (RP 92). Ms. Ferry testified that Brandi and Jose told Mr. Brown that they wanted J.J. and Sally out of there. (RP 91).

An admission by a party-opponent is not hearsay. ER 801(d)(2). Therefore, Mr. Brown's statement to Ms. Ferry would be admissible. However, Brandi and Jose's statements do not fall under any hearsay exception. Ms. Ferry should not have been allowed to testify regarding the statements that Brandi and Jose made to Mr. Brown. Allowing the double-hearsay, in violation of the evidence rules, was error.

b. *Allowing Ms. Ferry to Testify About Brandi and Jose's Statements Violated Mr. Brown's Right to Confront Witnesses.*

Both the Sixth Amendment to the U.S. Constitution and article I, section 22 of the Washington State Constitution guarantee a defendant the right to confront witnesses against him. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004); *see also* WASH. CONST. art. I § 22; U.S. CONST. amend. VI. "The primary and most important component is the right to conduct a meaningful cross-examination of adverse witnesses." *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002).

While a trial court's decision to admit evidence is reviewed for abuse of discretion, appellate courts review a claimed violation of the confrontation clause de novo. *State v. Chambers*, 134 Wn.App. 853, 858, 142 P.3d 668 (2006) (*citing State v. Larry*, 108 Wn.App. 894, 901, 34

P.3d 241 (2001)). "[C]onstitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless." *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). The remedy for violation of a defendant's confrontation rights is vacation of the conviction and remand for a new trial. *State v. Perez*, 139 Wn.App. 522, 529-532, 161 P.3d 461 (2007).

> Not every out-of-court statement used at trial implicates the core concerns of the confrontation clause. Rather, the scope of the clause is limited to "'witnesses' against the accused—in other words, those who 'bear testimony.' 'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" Thus, the confrontation clause gives defendants the right to confront those who make testimonial statements against them.

State v. Jasper, 158 Wn.App.518, 526, 245 P.3d 228 (2010) (internal citations omitted).

Testimonial evidence is not admissible unless the witness is available to be confronted by cross-examination or has been previously cross-examined. "The State has the burden on appeal of establishing that statements are nontestimonial." *State v. Alvarez-Abrego*, 154 Wash. App. 351, 364, 225 P.3d 396, 403 (2010), *citing State v. Koslowski*, 166 Wash.2d 409, 417 n. 3, 209 P.3d 479 (2009).

When the record does not contain sufficient facts to determine whether the statements were testimonial or non-testimonial, the State cannot prove they were non-testimonial. *Alvarez-Abrego*, 154 Wash. App. at 364. In *Alvarez-Abrego*, the trial court admitted double-hearsay in a

child assault case when a doctor was allowed to testify that the victim's mother told her that her four-year-old saw the defendant throw the baby against the wall. *Id.* at 360. Because the record did not contain details of how, why, or when that conversation occurred, the State could not establish that the statement was non-testimonial. *Id.* at 364. Similarly, in this case, there were no details about the conversation that Mr. Brown had with Brandi and Jose. Therefore, the State cannot prove that statement was non-testimonial.

"Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 68.

In this case, neither Brandi nor Jose testified at trial. There is no indication that they were unavailable or had been previously subject to cross-examination. Therefore, the statements should not have been admitted. Allowing Ms. Ferry to testify about their statements violated Mr. Brown's right to confront witnesses against him.

7. The Trial Court Improperly Allowed Mr. Mohr to Give an Expert Opinion When He Was Not Qualified to Given an Expert Opinion.

The trial court improperly allowed a volunteer fire fighter, with no formal training, to testify regarding the cause of the fire by testifying that this fire was unlike an electrical fire, and was similar to a fire started with gasoline.

If a witness is qualified as an expert, they are allowed to testify as to their opinion. ER 702. "[A] witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." ER 702.

"Under this rule, (1) the witness must be qualified as an expert; (2) the opinion must be based upon an explanatory theory generally accepted in the scientific community, and (3) the expert testimony must be helpful to the trier of fact." *State v. Black*, 109 Wash. 2d 336, 341, 745 P.2d 12, 15 (1987), *citing State v. Allery,* 101 Wash.2d 591, 596, 682 P.2d 312 (1984).

A trial court's ruling on the admissibility of opinion or expert testimony is reviewed for abuse of discretion. *State v. Ortiz*, 119 Wash.2d 294, 308, 831 P.2d 1060 (1992); *State v. Swan*, 114 Wash.2d 613, 655, 790 P.2d 610 (1990).

In this case, defense counsel objected to Mr. Mohr giving an opinion about the fire, as he did not qualify as an expert. (RP 48, 50). Mr. Mohr had been a volunteer firefighter for twelve years and responded to eight to ten trailer fires, he had no formal training, but had learned from more senior fire fighters. (RP 45-47, 49). The trial court found that Mr. Mohr was not qualified to express an opinion as an expert, but he could testify as to what he has seen in other fires and whether this fire was similar or different. (RP 52-53). The court held:

> I am going to permit him to testify regarding what he saw and how it differed from other trailer fires that he has seen. He may testify regarding the structure of the trailer, and in his experience, how that type of structure typically burns. Understood?

(RP 53). Mr. Mohr then testified that electrical fires normally engulf the entire trailer, but this fire was concentrated in the center of the trailer. (RP 56-57). He also testified that the fire moved when he sprayed it with a hose, which has happened in prior fires that have been started with diesel fuel or something similar. (RP 57-58). In closing argument, the State argued that because Mr. Mohr testified that the fire was concentrated and it moved when it was hit with water, it was suspicious. (RP 426).

Thus, Mr. Mohr, who was not qualified to give an expert opinion, was allowed to testify, in essence, that this was not an electrical fire and that the fire was started with an accelerant. Given the other evidence in this case, conflicting opinions on the cause of the fire and that no gasoline was found in the floor samples, this testimony was highly prejudicial.[2]

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[2] "For decades, fire investigators relied on a set of erroneous beliefs and assumptions, akin to folklore, about what were thought to be the telltale signs of arson that were passed down from one generation to the next and accepted at face value." Many of these theories have since been debunked. Mark Hansen, *Badly Burned: Long-held beliefs about arson science have been debunked after decades of misuse and scores of wrongful*, A.B.A. J., Dec. 2015, available at: http://www.abajournal.com/magazine/article/long_held_beliefs_about_arson_science_have_been_debunked_after_decades_of_m

8. The Cumulative Error Denied Mr. Brown a Fair Trial.

Even if the individual errors during trial do not require reversal, reversal is required if the cumulative effect of the errors denied the defendant a fair trial. See, e.g., *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); *State v. Alexander*, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992); *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970); *see also* WASH. CONST. art I, § 21, U.S. CONST. amend. VI, XIV.

This was a mostly circumstantial case. A green van associated with Mr. Brown was seen near the residence around the time of the fire. However, no one saw Mr. Brown go into the residence, heard the sliding glass door break at that time, and the witnesses' testimony was inconsistent with regard to the timeline and who was driving. The State's fire investigator concluded this fire was started with an accelerant, although the floor samples tested negative for gasoline. The defense fire investigator testified that the cause was undetermined and there were other causes that had not been sufficiently ruled out. In addition, Diana Norris had made threats to burn Ms. Emery's things and made incriminating statements about the fire.

The most damaging testimony was the improperly admitted impeachment testimony from Mr. Snodgrass, that the defendant had said

that he started the fire in exchange for a truck. Ms. Ferry's testimony that she dropped Mr. Brown off at the trailer and then picked him up later was also damaging, however, she clearly had motivation to implicate Mr. Brown. Her story changed after the police told her she was going to jail and she needed to call someone to get her kids. She was then given the option to testify against Mr. Brown or go to jail, and then implicated Mr. Brown. Ms. Ferry also improperly testified regarding double hearsay, when she said that Mr. Brown told her that Brandi and Jose wanted Sally and J.J. out and that they had talked about burning down the trailer. And, although Sally Emery's statements were stricken, she twice testified that Mr. Brown burned down her trailer. Given the circumstantial evidence, bias in Ms. Ferry's testimony, and the improper impeachment evidence, the cumulative effect of the errors in this trial denied Mr. Brown his right to a fair trial. Therefore, this matter should be reversed and remanded for a new trial.

9. This Court Should Not Impose Appellate Costs Because Mr. Brown is Indigent and Unable to Pay.

This Court has discretion on whether or not to impose appellate costs in a criminal case. *State v. Sinclair*, 192 Wash. App. 380, 389-90, 367 P.3d 612, 616 (2016); *see also* RAP 14.2[3], 14.1(c)[4].

> As a general matter, the imposition of costs against indigent defendants raises problems that are well documented in Blazina—e.g., "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." *Blazina*, 182 Wash.2d at 835, 344 P.3d 680. It is entirely appropriate for an appellate court to be mindful of these concerns. Carrying an obligation to pay [appellate costs] plus accumulated interest can be quite a millstone around the neck of an indigent offender.

Sinclair, 192 Wash. App. at 391-92, quoting *State v. Blazina*, 182 Wn.2d 827, 301 P.3d 492 344 P.3d 680, 686 (2015). Although *Blazina* is not binding for appellate costs, some of the same policy considerations apply. *Id.*

Under *Blazina*, a trial court must consider "important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay." *Blazina*, 182 Wn.2d at 838. In

[3] "A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, *unless the appellate court directs otherwise in its decision terminating review*." RAP 14.2 (emphasis added).
[4] "If the court determines costs in its opinion or order, a commissioner or clerk will award costs in accordance with that determination." RAP 14.1(c).

addition, if a person is considered indigent, "courts should seriously question that person's ability to pay . . . ." *Id.*

A trial court's finding of indigency will be respected unless there is good cause not to do so. *Sinclair*, 192 Wash. App. at 393; *see also* RAP 15.

In this case, Mr. Brown was found indigent and counsel was appointed for his trial, as well as this appeal. (Order of Indigency). In addition, the trial court waived all non-mandatory legal financial obligations (RP 490-91, CP 49-59). In addition, Mr. Brown was ordered to pay $7,180 in restitution as a result of this conviction. (CP 49-50). In this case, Mr. Brown was sentenced to 144 months in prison. (RP 490, CP 49-59). Mr. Brown is also serving prison sentences on two other felony matters, which are running consecutive to this sentence. (RP 490, CP 49-59). Mr. Brown was 47 years old at the time of sentencing. (RP 490). It is extremely unlikely that Mr. Brown will be able to pay any appellate costs after his release from prison. Therefore, this Court should exercise its discretion and not award appellate costs in this matter, if Mr. Brown does not substantially prevail.

I. CONCLUSION

In conclusion, Mr. Brown was denied his right to a fair trial because of the improperly admitted hearsay from multiple witnesses, the

prosecutor's misconduct, ineffective assistance of counsel, and the cumulative effect of the these errors. For all the reasons stated above, this matter should be reversed and remanded for a new trial.

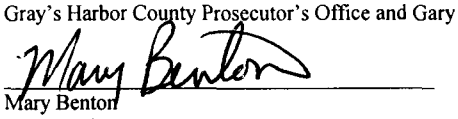
Dated this 6th day of July, 2016.

Respectfully Submitted,

JENNIFER VICKERS FREEMAN
WSBA# 35612
Attorney for Appellant, Gary Brown

Certification

I hereby certify that on July 6, 2016, I delivered
VIA: Email, E-service COA website and US Mail a true and correct copy of the
document to which this certificate is attached
for delivery to Jason Walker, DPA for the
Gray's Harbor County Prosecutor's Office and Gary Brown Jr.



Mary Benton
Legal Assistant

PIERCE COUNTY DEPARTMENT OF ASSIGNED COUNSEL

July 06, 2016 - 1:21 PM

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Sender Name: Mary E Benton - Email: mbenton@co.pierce.wa.us

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